Supreme Court, U.S.

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No. 94- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL JACKSON, ET AL.,
Petitioners,

v.

CULINARY SCHOOL OF WASHINGTON, LTD., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Michael E. Tankersley
(Counsel of Record)
Alan B. Morrison
David C. Vladeck
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 833-3000

Clare L. McCulla
LEGAL SERVICES OF NORTHERN VIRGINIA
110 N. Royal Street, Suite 505
Alexandria, VA 22314
(703) 684-5566

Counsel for Petitioners

November 15, 1994

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QUESTIONS PRESENTED

1. Did the Court below violate the rule of *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), and subsequent cases holding that federal courts are required to apply the choice of law rules of the forum in which they sit, by directing the district court to refuse to entertain an action for declaratory relief on the grounds that the choice of law issues presented by a declaratory action must be resolved in accordance with the choice of law rules of the forum chosen by the defendant for a future coercive action?

2. May a federal court refuse to entertain an action for declaratory relief on the ground that the issues should be decided in a future coercive action, where such a coercive action is not pending and may never be brought, and the federal court's refusal to entertain the action may deny the plaintiffs any opportunity to have any determination of their claims?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are fifty-eight former students of the Culinary School of Washington, Ltd., a vocational school operated in the District of Columbia. Petitioners, who were plaintiffs and appellants in the proceedings below, are Michael Jackson, Mark Herrin, Daniel Love, Don Johnson, Randall Hildebrand, Juana E. Lara, Darlene Pierce, Edwin Figueroa, Matthew Depompa, Lois Flowers, Maria V. Vasquez, Mark Turner, John Leonard, Michael Wiggins, Robert Jester, Theresa Clark, Stephen Batchelor, Douglas Paris, Assad Ghafoori, Jerome Lewis, James Gordon, Dorothy Valerie, Pablo Cortes, Ronald Seegers, Bertha Habib, Colleen Mahoney, Ricky Patterson, Carlton Goodwin, David Grant, Alvin Brown, Mary Nwoye Turner, Sonia Magana, Maria Guardado, Ralph Brown, Carlos Narvaez, Guillermo Moa, Andy Fallas, Pamela Head, Heriberto Vasquez, Allen French, Lolita Roberts, Robert Jones, Major Warren, Lee Vernick, Braudulina Ruiz, Andrew Kirksey, Ronnie Lyons, Joseph Link, Gwendolyn Coley, Linford Finn, John Quinn, Warren Irving, Castro Vadell, John McCray, Clyde Cogdill, Jacqueline Roswell, Elhambra Olatunji, and Arthur Thompson.

The defendants-appellees in the proceedings for which review is sought were Secretary of Education Richard Riley, in his official capacity as reinsurer of all petitioners' loans under the Higher Education Act and assignee of some of petitioners' loans, *see* 20 U.S.C. §§ 1078(c), 1082; Crestar Bank and Fifth Third Bank of Toledo, lenders which hold loans issued to some of the petitioners; Virginia State Education Assistance Authority, Ohio Student Loan Commission, Higher Education Assistance Foundation, Great Lakes Higher Education Corporation, Nebraska Student Loan Program, and Texas Guaranteed Student Loan Corporation, which acted as the guaranty agencies for petitioners' loans under 20 U.S.C. § 1085(j), and are the assignees of some of the loans.

Another student who was a party to the judgment below, Antonio Orr, is now deceased. Three other former students of the Culinary School of Washington, Ricky Stokes, Michael Tillman, and Cecelia Roberts, were plaintiffs in the district court proceedings below, but did not appeal. The Culinary School of Washington, Ltd., was a defendant in the district court proceedings, but did not appear, and a default judgment was entered against it. The Chairman and owner of the Culinary School of Washington, Barkev Kibarian, was initially named as a defendant in the district court, but was dismissed upon the filing of plaintiffs' Amended Complaint on June 2, 1992. The Student Loan Marketing Association was a defendant in the district court, but the claims against it were dismissed without prejudice on March 26, 1992, and that ruling was not appealed. None of these parties participated in the appeal which resulted in the judgment of the Court of Appeals for the District of Columbia for which review is sought here.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of Court of Appeals for the District of Columbia Circuit is reported at 27 F.3d 573, and is reprinted in the Appendix to this petition at pages A1-A24. The decision of the District Court for the District of Columbia is set forth in two opinions, a March 26, 1993 Opinion and Order reported at 788 F. Supp. 1233, which granted in part, and denied in part, certain motions to dismiss petitioners' claims, and a January 6, 1993 Opinion reported at 811 F. Supp. 714, which granted defendants' motions for summary judgment on all remaining claims. These opinions are reprinted in the Appendix at pages A25-A94.

JURISDICTION

The judgment of the Circuit Court of Appeals for the District of Columbia was entered on June 24, 1994. A timely petition for rehearing was denied on August 17, 1994. *See* A95. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Rules of Decision Act, 28 U.S.C. § 1652, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be

> regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

The Declaratory Judgment Act, 28 U.S.C. § 2201, provides, in pertinent part:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

STATEMENT OF THE CASE

Petitioners are borrowers under the federal guaranteed student loan program administered by the Secretary of Education who maintain that their loans are unenforceable because the school that arranged the loans made false representations and failed to deliver the educational services it promised. In the decision below, the Court of Appeals for the District of Columbia Circuit held that borrowers cannot bring a declaratory relief action to have these defenses adjudicated and enjoin further enforcement of the notes by the Secretary of Education and other participants in the federal guaranteed loan program.

The Court of Appeals' ruling that the federal courts cannot entertain petitioners' action for declaratory relief raises two issues, either of which would require reversal of the judgment below if resolved in petitioners' favor. First, the Court concluded that declaratory relief is not available because choice of law issues presented by the borrowers' defenses are governed by the choice of law rules of the forum in which a future coercive action would be brought, and the forum of a future coercive action could not be determined with certainty. That conclusion, however, is inconsistent with decisions of this Court, beginning with *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S.

487 (1941), holding that federal courts are obligated to apply the choice of law rules of the forum in which they sit.

Second, although the Court of Appeals assumed that there would be future coercive actions brought by defendants, it never examined whether such actions were likely or would adequately protect the borrowers' right to raise their defenses. In fact, the federal student loan program allows the Secretary of Education and guaranty agencies to collect from borrowers who are alleged to be in default, and to impose penalties on them, without ever instituting an action that would allow borrowers to present their defenses in court. Thus, the denial of declaratory relief here does not simply defer the issues to a hypothetical future proceeding, but may deprive the plaintiffs of *any* remedy.

A. The Guaranteed Student Loan Program.

The Guaranteed Student Loan Program ("GSLP") is one of a number of programs established by the Higher Education Act of 1965, 20 U.S.C. § 1001-1146a ("HEA"). *See* 34 C.F.R. § 682.100 (1992). Under the relevant portion of the Program, the federal government encourages lenders to make loans for student tuition, fees, and expenses by paying interest subsidies and special allowances to the lenders, and covering the lenders' losses in the event of default, provided that certain federal requirements are met. *See* 20 U.S.C. §§ 1078, 1087-1. The value of the loans issued annually under this program has steadily grown from approximately $9 billion in 1986, to almost $14 billion in 1992.[1]

Under the GSLP, private lenders make loans to eligible students to attend schools that the Secretary of Education has accepted for participation in the program as "eligible

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[1] The College Board, *Trends in Student Aid: 1982 to 1992* at 4, Table 1 (September 1992). Subsequent to the execution of the loans at issue here, the Higher Education Act Amendments of 1992 renamed the GSLP the "Federal Family Education Loan Program." Pub. L. No. 102-325, § 411, 106 Stat. 510 (1992).

institutions." 20 U.S.C. § 1085(a). State and private guaranty agencies insure these loans against default, and the Secretary of Education, in turn, reinsures the guaranty agencies against their losses. If the borrower defaults, the lender is reimbursed for the unpaid balance by the guaranty agency, and the guaranty agency may recover up to 100% of its losses, including administrative costs related to collection of the loan, from the Secretary of Education. *See* 20 U.S.C. § 1078(c)(1), (7). After making a reinsurance payment to a guaranty agency, the Secretary may demand an assignment of the loan or have the guaranty agency collect the loan on his behalf. *See id.* §§ 1078(c)(2)(D), 1078(c)(8); 34 C.F.R. §§ 682.404(g), 682.409 (1993).

The Secretary and guaranty agencies may initiate judicial proceedings to collect defaulted loans or invoke special remedies allowing them to collect from borrowers through extra-judicial means. The Higher Education Act authorizes the Secretary and guaranty agencies to garnish the wages of any borrower in default without filing a civil action. 20 U.S.C. § 1095a; 59 Fed. Reg. 22488 (April 29, 1994) (to be codified as 34 C.F.R. § 682.410(b)(10)). In addition, guaranty agencies and the Secretary can collect on the loans by having the Internal Revenue Service withhold tax refunds owed to borrowers. *See* 31 U.S.C. § 3720A; 34 C.F.R. § 30.33 (1994); 59 Fed. Reg. 22472, 22487 (April 29, 1994) (to be codified at 34 C.F.R. § 682.410(b)(6)(i)). Collections through tax offsets alone have accounted for almost 25% of the total collections on GSLP loans.[2] Before the loans are collected through administrative wage garnishment or intercepting tax refunds, the borrower is given notice by

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[2] Joseph D. Boyd and Carol Wennerdahl, THE CHARACTERISTICS OF STAFFORD STUDENT LOAN BORROWERS IN REPAYMENT AND THE IMPACT ON EDUCATIONAL DEBT ON PERSONAL AND ECONOMIC LIFE DECISIONS, Appendix, Table X-7.1 (June 1993).

mail, and may request that the Secretary or guarantee agency review the existence, amount or enforceability of the debt, but no judicial proceedings are required before garnishing wages or intercepting tax refunds. *See* 20 U.S.C. § 1095a(a)(5); 34 C.F.R. § 30.33(b)(3)(ii) (1994).

In addition, the Higher Education Act imposes penalties on borrowers in default, even if no efforts are ever made to collect on the loan through judicial proceedings, wage garnishment, or tax intercepts. Borrowers in default on a GSLP loan are barred from receiving any grant, loan, or other financial assistance under the Higher Education Act of 1965. 20 U.S.C. § 1091(a)(3); 34 C.F.R. § 668.7(a)(7) (1993). In addition, lenders and guaranty agencies are required to issue adverse credit reports to national credit bureaus on any borrowers who fail to make payments on their loans. 20 U.S.C. § 1080a; 34 C.F.R. §§ 682.208(b), 682.410(b)(5) (1993).

B. Plaintiffs' Claims.

In recent years, 20-30 percent of all GSLP loan funds have gone to proprietary and vocational schools offering relatively short term programs (six months to a year) in trades or job skills.[3] The default rate for students attending vocational schools using GSLP loans, however, is disproportinately high. For example, in 1987, the loan default rate for students at vocational schools was 39%, in contrast to 10% default rate for borrowers at 4 year schools.[4] Investigations into the GSLP program have repeatedly found that many vocational schools have engaged

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[3] The College Board, *Trends in Student Aid*, at 3, 9, Table 6 (Sept. 1992).

[4] *Abuses in Federal Student Aid Programs*, S. Rep. 102-58, 102d Cong., 1st Sess. 2 (1991); General Accounting Office, *Analysis of Student Default Rates at 7,800 Postsecondary Schools*, GAO/HRD-89-63BR, at 15 (July 1989).

in fraud or other abuses to induce students to sign GSLP loans, or failed to provide adequate training to students after they enrolled.[5] Numerous suits have been filed by former students challenging the enforceability of GSLP loans arranged by such vocational schools.[6]

The Culinary School of Washington (CSW) was a proprietary school headquartered in Washington, D.C., which financed the enrollment of most of its students by arranging for them to execute GSLP loans. Overall, CSW received over $18.8 million in federal loans, including approximately $6.6 million in 1989. App. at A26 n.4.

CSW recruited students by representing that it would provide vocational training in the culinary arts which, after 25 weeks, would qualify students as certified gourmet chefs. Among other things, the school promised to provide training by master chefs in professionally equipped kitchens in various embassies, as well as transportation, housing, financial assistance, and job placement services. Relying on these representations, petitioners in this case enrolled in the school, and signed GSLP loans. App. at A5-6.

CSW arranged petitioners' loans, and the students had no direct contact with the lenders. CSW presented the students with pre-printed loan applications and promissory notes,

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[5] *Abuses in Federal Student Aid Programs, Hearings before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs*, 101st Cong., 2d Sess., S. Hrg. 101-659, Pt. 2, 153-58 (1990); Office of Inspector General, U.S. Department of Education, SEMIANNUAL REPORT TO CONGRESS, No. 22, October 1, 1990-March 31, 1991, at 9-23.

[6] *See, e.g., Tipton v. Secretary of Education*, 768 F. Supp. 540 (S.D.W.Va. 1991); *Keams v. Temple Technical Institute, Inc.*, 807 F. Supp. 569 (D. Ariz. 1992); *Williams v. National School of Health Technology, Inc.*, 836 F. Supp. 273 (E.D. Pa. 1993); *Bogart v. Nebraska Student Loan Program*, 313 Ark. 656, 858 S.W.2d 78 (1993).

selected the lenders for the students' loans, completed portions of the loan notes, and was responsible for presenting the terms of the loan to the students. CSW then forwarded the completed forms to the lenders and guaranty agencies, which approved the loans and issued the funds to CSW. App. at A6.

Official investigations of CSW repeatedly found that CSW misrepresented its services, failed to fulfill its promises to students, and mishandled loan funds.[7] The training provided by CSW was inadequate, its facilities were unsanitary and outdated, and it often failed to provide the transportation and housing it promised. App. A6. In January 1990, after repeated complaints concerning its misconduct, and in the midst of an investigation by the District of Columbia Educational Licensure Commission, CSW filed for bankruptcy, and the school ceased operations. *Id.*

In 1991, petitioners filed this action against CSW, the lenders on their loans, the guaranty agencies, and the Secretary of Education. Petitioners alleged that CSW fraudulently induced them to enroll and to execute GSLP loans, and had breached its contractual obligations. Petitioners further alleged that, because of CSW's involvement in arranging the loans, their claims and defenses against CSW could be asserted as defenses to enforcement by the lenders, the guaranty agencies, and the Secretary.

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[7] *See, e.g.*, Department of Education, Office of Inspector General, Inspection Report of Culinary School of Washington, Ltd. (Insp. No. N-0000903) (May 21, 1990); *Abuses in Federal Student Aid Programs, Hearings before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs*, 101st Cong., 2d Sess., S. Hrg. 101-659, Pt. 2, 308-379 (1990) (describing investigations by the District of Columbia Educational Licensure Commission, the Department of Education, the Higher Education Assistance Foundation, and accrediting agencies).

Petitioners' claims against the Secretary, guaranty agencies, and the lenders rest on state and federal consumer laws that provide that, when the seller arranges a loan in a consumer transaction, the consumers' claims and defenses against the seller are preserved and can be raised against the lender or assignees of the loan. A number of states and the District of Columbia have adopted consumer protection laws that provide for such preservation of consumer defenses in order to prevent the use of financing arrangements to abrogate or "cut-off" consumer claims and defenses. *See, e.g.*, D.C. CODE § 28-3807-09 (1991); ARIZ. REV. STAT. ANN. § 44-145 (1994); N. Y. GEN. BUS. LAW § 253 (Consol. 1993); MASS. GEN. ANN. LAWS ch. 255, § 12F (1988); MD. CODE ANN., COM. LAW. § 12-309 (1993); *see also Uniform Consumer Credit Code, 1974 Act*, § 3.405, 7A U.L.A. 130-31 (1985).

This principle of preserving consumer defenses is also embodied in the Federal Trade Commission's rule on the "Preservation of Consumer Claims and Defenses," which requires that, if the seller and lender cooperate in arranging financing, the loan must include a provision stating that the it is subject to all claims and defenses that the borrower has against the seller. *See* 16 C.F.R. § 433.2 (1994) ("FTC Holder Rule"); *see generally* 40 Fed. Reg. 53507-16, 53524-25 (1975) (discussing rationale for FTC Holder Rule); J. Fonseca, HANDLING CONSUMER CREDIT CASES, § 2.18-20, at 69-84 (3d ed. 1986) (discussing FTC Holder Rule and state laws). Finally, the Department of Education, and its predecessor, the Office of Education, have stated that the FTC Holder Rule is applicable to GSLP loans and, if loanmaking functions are delegated to a school in an "origination relationship," 34 C.F.R. § 682.200 (1993), the school's failure to deliver the services purchased by the loan

provides the student with a defense against the obligation to repay the lender all or part of the loan.[8]

CSW failed to appear, and the district court entered a default judgment finding the school liable for fraud and breach of contract. The district court, however, rejected each of petitioners' arguments that CSW's misconduct gave rise to defenses against the lenders, the guaranty agencies and the Secretary, on the basis that petitioners' claims were preempted by federal law or failed to state a claim, or on the ground that the claims did not survive defendants' summary judgment motions. App. at A7-8.

C. The Appellate Court's Ruling.

On appeal, petitioners challenged four aspects of the district court's rulings, three of which involved, in part, issues of state law, and one of which rested entirely on federal law. First, petitioners challenged the district court's ruling that the District of Columbia statutes that preserve claims and defenses on consumer loans are preempted by

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[8] *See* App. at A22-23 (quoting Department of Education statements that "where there is an origination relationship between the school and the lender, the student's claims and defenses as to the school can be asserted as defenses to the loan contract, whether rights under the loan contract are being asserted by the lending bank, the guaranty agency or the Secretary."); 34 C.F.R. § 682.604(f)(2)(iii) (1993) (students should be counselled that they cannot raise school-related defenses on a loan, "other than a loan made or originated by the school."); 55 Fed. Reg. 48327 (1990) (referring to "longstanding view" that defenses are preserved if "origination relationship" exists between school and lender); *United States v. Griffin*, 707 F.2d 1477, 1480-84 (D.C. Cir. 1983) (describing 1976 Office of Education bulletin stating that FTC Holder Rule applies to student loans, and Office of Education regulations on preservation of student defenses on school originated loans); App. at A5 n.5 (Department of Education has incorporated FTC Holder Rule Notice in new loan application forms).

federal law. App. at A39-40, A54-55. Petitioners also raised claims based on the FTC Holder Rule in which they challenged the district court's ruling that, although the FTC Holder Rule applies to GSLP loans, the provisions of the Notice required by the Rule could not be implied into the notes under state common law principles, App. at A43-48, and its ruling that neither the District of Columbia statutes, nor the District of Columbia's proprietary school regulations, provided any remedy against enforcement of loans issued in violation of the Holder Rule. App. at A55-57, A87-90. Finally, petitioners challenged the district court's holding that the Secretary of Education was entitled to summary judgment on petitioners' claim that their defenses were preserved under the Secretary's statements on "origination" because the allegations that CSW originated the loans were not supported by the evidence. App. at A83-86.

The Court of Appeals only decided the merits of this last claim. Although the Secretary had never raised the issue in the district court, the Court of Appeals requested supplementary briefing on whether the Secretary's statements concerning "origination" represent a binding "rule" enforceable by third parties. App. at A18-20. The Court of Appeals concluded that the language and context of Secretary's statements indicated that the statements were not intended to create new rights or defenses as a matter of federal law, particularly because the Department has indicated that "it preferred continuation of the regime of state defenses to the promulgation of a uniform federal rule." App. at A24.

The Court of Appeals also ruled that Congress had not displaced state defenses and established a uniform federal rule by express preemption or implied preemption of the field, and state law governs the rights of the lenders and guaranty agencies unless it is in "actual conflict" with federal law. App. at A13-15. Moreover, the Court held that the Secretary's rights to enforce the loans under federal law must also be determined by reference to state law. Although the

rights and obligations of the Secretary were governed by federal common law, the content of federal common law in the federal loan context is determined by the applicable state standards, absent proof that those standards are in conflict with the federal law. App. at A9 n.9 (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979)).

The Court of Appeals ultimately held, however, that it would not resolve the state law and the federal common law issues presented by petitioners' challenges to the district court's rulings on preemption and the FTC Holder Rule. Although no party had questioned the appropriateness of declaratory relief in the district court or on appeal, the Court of Appeals, without requesting any briefing on the issue, ruled that the district court acted improperly in addressing these claims on the merits, and directed that all claims requiring the resolution of issues of state law be dismissed without prejudice. App. at A3, A9-A17.

The Court of Appeals maintained that declaratory relief was inappropriate because it could not determine which choice of law rules to apply. Although most, if not all, of the students signed their loan forms at CSW in the District of Columbia, one defendant (Crestar Bank) had argued that petitioners could not rely on District of Columbia law because the loans were approved by lenders outside the District of Columbia, or contained choice of law provisions stating that the loan should be governed by the law of other states. In response, petitioners argued that the choice of law provisions, even if otherwise valid, cannot be used to defeat the fundamental policies of the forum state that cannot be waived by agreement, such as the District of Columbia consumer protection laws at issue here. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971)); *Munter v. Lankford*, 127 F. Supp. 630, 632-33 (D.D.C. 1955).

The Court of Appeals, however, refused to resolve this issue on the grounds that "we have no way of knowing what choice of law rules will obtain." App. at A15. The Court

maintained that choice of law issues are governed by the choice of law rules of the forum in which a future coercive action would be brought, and "we can only speculate whether D.C. law will govern any future coercive suit brought by the declaratory judgment defendants." App. at A9. "In light of this uncertainty," the Court held that it would not resolve "whether D.C. law, which may or may not apply in a future coercive action," is preempted by federal law, *id.* at App. A15, nor decide petitioners' claims that their defenses are preserved under the FTC Holder Rule. App. at A17.

In holding that the district court was required to dismiss petitioners' request for declaratory and injunctive relief in favor of "future coercive action[s] brought by the declaratory judgment defendants," App. at A15, the Court of Appeals did not examine whether such actions were likely or would provide an adequate mechanism for resolving petitioners' defenses. Nor did the court address petitioners' claims for injunctive relief "to remove adverse information relating to these loans from the Plaintiffs' credit records and restore eligibility of the Plaintiffs to participate in the GSL program and Pell Grant Program." Complaint, Prayer for Relief, ¶ 4 (JA 308).

The Court of Appeal's analysis of the declaratory relief and choice of law issues originated solely with the Court, as no party had raised such claims, and the parties had no opportunity to present evidence or legal argument on these issues before the Court of Appeals made its decision. After the decision, petitioners filed a motion for rehearing arguing that the Court of Appeals' novel analysis of the choice of law issues violated the rule of *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), and that the denial of declaratory and injunctive relief in favor of future coercive actions could not be reconciled with *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942), particularly where extra-judicial collection was authorized and there was no assurance that petitioners would ever be able to obtain a determination of their defenses in another proceeding. The petition for

rehearing was denied, without elaboration, on August 17, 1994. App. at A95.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision severely restricts the availability of declaratory relief in situations where an action for a declaratory judgment may be the only way a party can obtain adjudication of his or her claim. Because this ruling presents substantial questions concerning the rules of decision in federal courts, and the ability of federal courts to refuse to entertain declaratory judgments when there is no adequate alternative remedy, this Court should grant review.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT THAT REQUIRE FEDERAL COURTS DECIDING QUESTIONS OF STATE LAW TO APPLY THE CHOICE OF LAW PRINCIPLES OF THE FORUM IN WHICH THEY SIT.

This Court should grant review to resolve whether the canon that federal courts are required to apply the choice of law rules of the forum in which they sit applies in declaratory judgment actions or, as the Court below concluded, the federal courts must look to the choice of law rules of the forum of future coercive actions. This question not only affects the applicable rules of decision, but also affects the scope of the declaratory relief remedy. If, as the Court below concluded, declaratory judgment actions are governed by the choice of law rules of the potential future coercive actions, the availability of declaratory relief will be severely restricted because federal courts will be required to dismiss such actions wherever choice of law issues exist and future coercive actions may be brought in more than one jurisdiction.

The central premise of the decision below is that, when choice of law issues are presented in a declaratory judgment action, and it is uncertain where a future coercive action by the defendant will be brought, declaratory relief is

unavailable in the federal courts because the court must apply the choice of law rules of the forum of a future coercive action and "we have no way of knowing what choice of law rules will obtain." App. at A15. This ruling ignores the well-established rule of that federal courts must follow the choice of law rules of the jurisdictions in which they sit. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). This Court has made clear that this rule applies even where the federal court disagrees with the wisdom of the choice of law rules of the local jurisdiction, *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4-5 (1975), and where the issue is whether the local choice of law rules would refuse to give effect to contractual terms because they are contrary to the public policy of the forum. *Griffin v. McCoach*, 313 U.S. 498, 503-04 (1941). No prior case of this Court supports the Court of Appeals' assumption that the *Klaxon* rule does not apply to declaratory judgment actions.

Moreover, the Court of Appeals' conclusion that *Klaxon* does not apply to declaratory judgment actions frustrates the very purpose of *Klaxon* and the Rules of Decision Act, 28 U.S.C. § 1652. Federal courts are required to apply the choice of law rules of the forum in which they sit because any other result would "disturb the equal administration of justice in co-ordinate state and federal courts sitting side by side." *Klaxon*, 313 U.S. at 496 (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74-77 (1938)). This rationale is fully applicable to declaratory judgments. A declaratory judgment brought in federal court should be governed by the same legal rules, including choice of law rules, as a parallel action in local courts seeking the same relief. The decision below violates this Court's teaching that federal courts are "not free to engraft onto [state choice of law rules] exceptions or modifications," which deny litigants remedies that would otherwise be available if the action were brought in state court. *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. at 4.

Indeed, the issue is starkly presented in the context of this case because of the federal government's removal authority. As with other GSLP borrowers, the loans of many of the petitioners in this action have been assigned to the Secretary of Education. *See infra* note 9. Thus, even if these borrowers were to initiate an action for declaratory and injunctive relief against enforcement of the loans in state court, the Secretary would be free to remove the action to federal court. 28 U.S.C. § 1442(a)(1). Under the Court of Appeals' decision, however, the federal court would be required to dismiss the action without ever adjudicating the merits. Thus, in this context, failing to apply the choice of law rules of the forum not only results in the federal court reaching a different result, but it precludes borrowers from ever obtaining relief that may be authorized by state law.

The Court of Appeals' conclusion that declaratory relief must be denied in order to allow the defendant to select the forum and, thus, the governing choice of law rules, is also in conflict with the rationale of other decisions of this Court. In *Van Dusen v. Barrack*, 376 U.S. 612, 629-40 (1964), this Court held that, even where a plaintiffs' action is transferred to another forum for the convenience of the parties and witnesses, the choice of law rules of the forum selected by the plaintiff still govern because plaintiffs should be allowed "to retain whatever advantages may flow from the state laws of the forum they have initially selected." *Id.* at 633. The Court concluded that nothing in the language or policy of the 28 U.S.C. § 1404(a) would "justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue." *Id.* at 634; *accord Ferens v. John Deere Co.*, 494 U.S. 516 (1990) (*Van Dusen* holding also applies where plaintiff initiates transfer). In the same way, nothing in the Declaratory Judgment Act alters the normal rule that plaintiffs are entitled to the benefit of their chosen forum, or suggests that federal courts should deny declaratory relief in order to allow the defendant to chose the forum.

Finally, the decision below warrants review because it substantially restricts the availability of declaratory relief in the federal courts. If, as the decision below holds, federal courts must dismiss claims for declaratory relief where choice of law issues exist and future coercive actions could be brought in more than one jurisdiction, many actions historically adjudicated through declaratory judgments could not be maintained.

For example, the declaratory judgment act is designed to provide a mechanism for addressing insurance coverage and other contractual disputes by declaring the rights and obligations of the parties. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937). Such cases frequently raise difficult choice of law issues, and involve disputes in which a coercive action may be brought in any one of a number of jurisdictions. *See, e.g., Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1320-21 (8th Cir. 1991); *Eli Lilly and Co. v. Home Ins. Co.*, 764 F. 2d 876, 880-81 (D.C. Cir. 1985); *Melville v. American Home Assur. Co.*, 584 F.2d 1306, 1310-11 (3d Cir. 1978). Moreover, federal programs involving loans and other contractual obligations will generally be governed by state law principles and, thus, will raise potential choice of law issues. *See, e.g., United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29 (1979) (Small Business Administration loans generally governed by state law principles unless they frustrate federal objectives).

Under the decision below, however, the availability of declaratory judgments for these actions is severely restricted because the federal court cannot determine which forum's law governs the choice of law issues and, thus, it must dismiss such actions without addressing the merits. Indeed, the choice of law issues presented in this case are typical of those that arise in cases concerning contracts involving parties in different states. The issue of whether contractual provisions in the loan supplant District of Columbia law presents an ordinary conflict of law issue to be decided by the federal court or, if necessary, certified to the local

courts. *See Clay v. Sun Ins. Office*, 363 U.S. 207 (1960); *Eli Lilly and Co. v. Home Ins. Co.*, 764 F.2d at 884. But if *Klaxon* does not apply to declaratory judgment actions, such issues are indeterminable because it is impossible to ascertain which choice of law rules govern, and federal courts will be unable to entertain actions for declaratory relief when such issues are involved.

II. THIS COURT SHOULD REVIEW THE COURT OF APPEALS' RULING THAT A FEDERAL COURT IS REQUIRED TO REFUSE TO ADJUDICATE AN ACTION FOR DECLARATORY JUDGMENT EVEN WHERE, AS HERE, DENIAL OF SUCH RELIEF MAY DENY THE PLAINTIFF ANY FORUM IN WHICH TO LITIGATE HIS OR HER CLAIM.

This Court should also review the Court of Appeal's ruling that a federal court may (indeed, in this case, is *required* to) dismiss a plaintiff's action for declaratory relief in favor of a future coercive action by the defendant -- even where such an action may be inadequate or may never be brought. Although the decision below purports to reserve the resolution of the federal preemption and other legal questions for "future coercive suit[s] brought by the declaratory judgment defendants," App. at A9, borrowers under the GSLP are subject to penalties before any such actions are brought and, moreover, defendants may collect on the loans without bringing a civil action. Consequently, the decision below does not simply postpone an inevitable adjudication, but may deny petitioners *any* opportunity for adjudication of the merits of their claims that such penalties and collection actions are unlawful because their loans are subject to valid defenses.

This holding is inconsistent with this Court's jurisprudence concerning when federal courts may dismiss or abstain in declaratory judgment actions, or other proceedings, in favor of an alternative proceeding. In *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 495 (1942), this Court

held that, even where there is another *pending* state court action, a plaintiff should not be denied the opportunity to obtain declaratory relief unless the alternative action is shown to provide a *better* mechanism for adjudicating the plaintiffs' claims. Commentators have likewise maintained that "[i]t is only where the court believes that *more* effective relief can and should be obtained by another procedure . . . that it is justified in refusing a declaration because of the availability of another remedy." E. Borchard, DECLARATORY JUDGMENTS 2D, 303 (1941).

In other contexts, this Court has also held that federal courts should not abstain or dismiss actions in favor of a concurrent proceeding unless it is shown that the other proceeding "will be an adequate vehicle for the complete and prompt resolution of the issues between the parties." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 28 (1983) (improper to stay federal suit seeking arbitration in deference to parallel state court action); *see also Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) (abstention in favor of state court prosecution "naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved."); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817-19 (1976) (federal courts have "virtually unflagging obligation" to exercise jurisdiction given them and "[o]nly the clearest justifications will warrant dismissal" in favor of state court proceedings). Indeed, this Court's decisions teach that if there is "any substantial doubt" that the alternative proceeding is adequate, stay or dismissal of a plaintiff's federal action in deference to the alternative proceeding is "a serious abuse of discretion." *Moses H. Cone Mem. Hosp*, 460 U.S. at 28.

The decision below is at odds with these principles because it provides that declaratory relief must be denied to borrowers in the student loan program even where there is no other pending action and, indeed, no assurance that there will *ever* be an action in which the claims will be adjudicated.

Where *Brillhart* held that it was improper to deny declaratory relief in favor of a *pending* state action unless it was first determined that action provided an adequate opportunity to present the claims in the declaratory judgment action, the decision below provides that declaratory relief *must* be denied, despite the absence of *any* pending action, or even imminent threat that such an action will be brought. *See* E. Borchard, *supra* at 349 (declaratory action should be dismissed in favor of an imminent action "only in the clearest case.")

Moreover, the decision below mandates the dismissal of declaratory relief without conducting any inquiry into whether future coercive actions will be adequate to protect borrowers' rights. Because the appropriateness of declaratory relief was never questioned by the district court or the parties, the Court of Appeals denied declaratory relief without any record and without giving the parties any opportunity to be heard on the likelihood or adequacy of future coercive actions. *Compare Brillhart*, 316 U.S. at 495-97 (issues concerning adequacy of pending state garnishment action should be remanded to the district court to conduct appropriate inquiry).

More importantly, for many borrowers in the GSLP, the prospect of a future coercive action is illusory. Under the GSLP, lenders do not bring suit to enforce contested loans, but are fully reimbursed by the guaranty agencies after they have made demands for payment. 34 C.F.R. § 682.411 (1993). Guaranty agencies are also entitled to reimbursement from the Secretary without ever filing suit if they determine that the cost of litigation exceeds the likely recovery, or that the borrower lacks the means to satisfy a judgment on the debt. 59 Fed. Reg. 22488 (April 29, 1994) (to be codified at 34 C.F.R. § 682.410(b)(6)(vii)(B)). Moreover, the Secretary and guaranty agencies can, and frequently do, collect loans through wage garnishment or tax refund intercepts without ever filing a civil action. *See, e.g.*, *Games v. Cavazos*, 737 F. Supp. 1368, 1370-72 (D. Del.

1990) (private agency assigned loan to Secretary for collection through tax intercepts after a series of collection notices); *Thomas v. Bennett*, 856 F. 2d 1165, 1166 (8th Cir. 1988) (only collection action was by tax offset nine years after loan was made); *Gerrard v. United States Office of Education*, 656 F. Supp. 570, 571-72 (N.D. Cal. 1987) (same). Indeed, the Secretary and guaranty agencies have every incentive to use these less costly, non-judicial collection methods, particularly where the amounts of individual loans are relatively modest and the borrower's resources are limited.[9]

Thus, denying declaratory relief effectively forecloses the opportunity for many borrowers in the GSLP to litigate the validity of their defenses to the loans. If the Secretary or guaranty agencies pursue collection through wage garnishment or tax intercepts, the borrower may request that they review "the existence, amount, enforceability, or past due status of the debt." 34 C.F.R. § 30.33(b)(3)(ii) (1994). But this procedure is plainly not a substitute for declaratory relief, or equivalent to the ability to raise defenses in a civil action to enforce the loan. Apart from the fact that the review is conducted by the Secretary or the guaranty agency, the procedure provides no mechanism to compel testimony or gather evidence, *see id.* § 30.24-26 (1994), and no means to litigate the "difficult preemption questions" and other

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[9] Because the propriety of declaratory relief was never contested below, the record on the extent to which the tax intercept procedure has been, and is being used, to collect from the petitioners here was not developed. Nonetheless, the record shows that by 1992 the Secretary had already taken assignment of loans to students attending the Culinary School of Washington for the purpose of intercepting the borrowers' federal tax refunds. *See* Response of Secretary of Education to Plaintiffs' First Interrogatories, Inter. Nos. 2-4 (May 11, 1992) (reproduced in Joint Appendix below at JA 818-820).

complex issues that the Court of Appeals declined to adjudicate. App. at A9.

In addition, if the loan is collected by intercepting tax refunds, review of the Secretary of the Treasury's actions is precluded by statute, 26 U.S.C. § 6402(e), so the only means to challenge the government's claim that withholding of the borrowers' tax refunds is justified by a "legally enforceable debt," 31 U.S.C. § 3720A(a), is through an action for declaratory or injunctive relief against the Department of Education or the guaranty agency that claims that the debt is enforceable. *See Thomas v. Bennett*, 856 F. 2d at 1167-68; 26 C.F.R. § 301.6402-6(l) (1994). This, however, is precisely the type of action foreclosed by the decision below.[10]

Furthermore, even if the Secretary and guaranty agencies never seek to collect the disputed loan through tax intercepts, wage garnishment, or civil actions, borrowers are subject to penalties for which they have no redress if declaratory relief is foreclosed. Lenders and guaranty agencies are required to report defaulted loans to credit bureaus even if no civil enforcement action is initiated and, indeed, before any such action would be initiated. *See* 34 C.F.R. §§ 682.208(b), 682.410(b)(5) (1993). In addition, any borrower who is in default on a GSLP loan, even if the debt is disputed, is barred from receiving any grant, loan, or other financial assistance under the Higher Education Act of 1965. 20 U.S.C. § 1091(a)(3); 34 C.F.R. § 668.7(a)(7) (1993).

Injunctive or declaratory relief is generally available to remedy such harms "to prevent one party from continually

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[10] The Court of Appeals' decision does not necessarily foreclose a borrower from whom funds have already been collected through administrative garnishment, or other means, from bringing an action for monetary relief. A borrower, however, should not be compelled to wait until money is collected on a disputed loan before he or she can contest its enforceability.

accusing the other, to his detriment, without allowing the other to secure an adjudication of his rights by bringing suit." *Tempco Elec. Heater Corp. v. Omega Engineering Inc.*, 819 F.2d 746, 749 (7th Cir. 1987); *accord* E. Borchard, *supra*, at 304, 349 (declaratory action to adjudicate defenses should be available to protect the legal interest of a prospective defendant "in repelling an unjust claim, and in clearing his right or title"). Under the decision below, however, declaratory relief is not available to the millions of borrowers who have participated in the GSLP. The hypothetical prospect of a future coercive action provides no remedy since these injuries occur from the time the borrower refuses to pay the contested loan, and regardless of whether any coercive action is ever pursued.

Finally, this ruling has important implications beyond this case for the GSLP and other federal programs where similar issues arise. The allegations underlying this action are not isolated; there are numerous reports documenting widespread fraud and misrepresentation, inadequate training, and other abuses in the GSLP program.[11] The reported cases concerning student claims, *see supra* note 6, reflect only a small fraction of the disputes concerning the effect of such abuses on the enforceability of student loans. Moreover, other federal programs present similar issues because federal law gives agencies the authority to collect on alleged obligations through tax intercepts, 31 U.S.C. § 3720A, and "administrative offsets" of funds owed by the government, *id.* § 3716, without instituting a civil action. The decision below raises important questions concerning the availability

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[11] *See, e.g. Abuses in Federal Student Aid Programs*, S. Rep. 102-58, 102d Cong., 1st Sess. 11-13 (1991).

of declaratory relief to resolve disputes concerning enforcement of such obligations.[12]

CONCLUSION

This Court should issue a writ of certiorari to review the decision of the Court of Appeals for the District of Columbia Circuit in this action.

Respectfully submitted,

Michael E. Tankersley
(Counsel of Record)
Alan B. Morrison
David C. Vladeck
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 833-3000

Clare L. McCulla
LEGAL SERVICES OF
NORTHERN VIRGINIA
110 N. Royal Street,
Suite 505
Alexandria, VA 22314
(703) 684-5566

Counsel for Petitioners

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[12] Although it is not clear whether it was determinative of the outcome of the judgment below, subsidiary to each of the questions presented here is the question of the standard for appellate review of a district court's decision to exercise its discretion to grant or deny declaratory relief. As the Court of Appeals' opinion observes, the circuit courts are divided over this issue: the District of Columbia and six other circuits have held that the district court's decision to exercise its discretion is reviewed *de novo*, four circuits hold that such decisions are reviewed only for abuse of discretion, and two circuits apply an intermediate standard of review. *See* App. at A10-12 (citing cases). This Court's decisions suggest, contrary to the decision below, that the question of whether it is appropriate to defer to an alternative proceeding should be examined by the district court in the first instance, *see Brillhart*, 316 U.S. at 495-97, and that the resolution of this issue is committed to the district court's discretion. *See Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 664 (1978).